In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5919

JOHN CIVITKOVICH, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE

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STATEMENT OF CASE

The appellant was charged, by indictment, with several violations of the National Prohibition Act, the indictment containing six counts. The first

count charged possession of four (4) ounces of whiskey on August 11, 1928. The second charged possession of one (1) pint of whiskey on August 11, 1928. The third charged a previous conviction of the appellant on February 28, 1928, for possession of intoxicating liquor in violation of the National Prohibition Act. The fourth charged the sale of two (2) ounces of whiskey on the 13th day of August, 1928. The fifth charged previous conviction of the appellant on February 28, 1929, for the sale of intoxicating liquor in violation of the National Prohibition Act. The sixth charged the maintenance, by the appellant, of a common nuisance at 520 Jackson Street, in the City of Seattle. (Tr. 2 to 6.)

On the trial, the appellee produced a witness named H. E. Daggett, who testified that he was a Federal Prohibition Officer and that on the 11th day of August, 1928, he visited the premises at 520 Jackson Street, in the City of Seattle, which is a pool hall and soft drink place, and inquired of one John Kuchin if he could get a drink of whiskey, and, being answered in the affirmative, purchased two drinks of whiskey, one for himself, and one for a friend who accompanied him. That later in the after-

noon of the same day he returned alone and met the appellant and purchased a drink of whiskey from him and that on the 13th of August, 1928, he purchased another drink of whiskey from the appellant at the same place, in company with his brother.

As a part of the Government's case in chief, it was stipulated in open court, by the attorneys for the respective parties, that the appellant had been previously convicted of possession and sale of intoxicating liquor in violation of the National Prohibition Act and was the same person referred to in Counts Three (III) and Five (V) of the indictment. (Tr. 19 and 20.)

The appellant was introduced as a witness in his own behalf—the absence of other witnesses was explained as being out of the country—and testified that he had never, at any time, sold any intoxicating liquor to the witness Daggett and that the first time he had ever seen the witness was when he was placed upon the witness stand as a witness for the Government. That he was arrested on Thanksgiving evening, 1928, at 520 Jackson Street, in the City of Seattle, as part of a general round-up of the neighborhood, and that at the time of the arrest no liquor

was found upon the premises, although a search was made by the arresting officers, and it was not claimed that he was then guilty of any violation of the National Prohibition Act. That the arresting officers were Federal Prohibition Officers Whitney and Corvin, and at the time of the arrest it was suggested by Whitney to Corvin, in the presence and hearing of the witness, that the Government had no case against the appellant, to which Corvin responded that he intended to make one. This testimony was objected to by the attorney for appellee and the objection sustained, and an exception allowed. Thereupon, the attorney for appellant offered to prove these facts but the offer was rejected and an exception allowed, the trial judge stating that the evidence was not admissible because Corvin had not been called as a witness by the Government.

On cross-examination the appellant testified that he had no interest in the premises known as 520 Jackson Street or in the business conducted there and was present there at the time of his arrest temporarily while the owner was absent on an errand, and that while he had worked there occasionally in the past, he was unable to state whether he had worked

there at any time during the month of August, 1928. (Tr. 21-22.)

After being instructed by the court on the law applicable to the case, the jury retired and thereafter returned a verdict finding the appellant guilty on all six counts of the indictment. (Tr. 7.)

A motion for a new trial was interposed on behalf of the appellant and denied. In support of this motion an affidavit of the appellant was submitted to the court. In this affidavit the appellant set forth that he was arrested on the evening of November 27, 1928, at 520 Jackson Street, in the City of Seattle, by Federal Prohibition Officers Whitney and Corvin; that at the time of his arrest he did not have possession of any intoxicating liquor and Whitney remarked to Corvin that they had no case against him, and in response to that remark Corvin said, "Hell, I'll make a case against him," and that if permitted to testify he would testify to this conversation between the arresting officers and could produce a witness who also overheard the said conversation. (Tr. 9 and 10.)

At the time of the presentation of the motion for a new trial a stipulation in writing, entered into by

the attorneys for the respective parties, was submitted to the trial judge reciting that while the appellant was a witness in his own behalf a question was propounded to him by his attorney which called for a conversation in his presence between Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin as to what was said at the time of the arrest and that the court objected and refused to permit the witness to answer. (Tr. 12.)

Thereafter the appellant was sentenced to pay a fine of Two Hundred and Fifty Dollars ($250.00), and to serve a period of four months in the county jail of Jefferson County, Washington. (Tr. 8.)

From this judgment and sentence, appeal was taken.

ASSIGNMENT OF ERRORS

I.

That the District Court erred in refusing to permit the appellant to testify to the conversation between Federal Prohibition Officers Whitney and Corvin at the time of his arrest.

II.

The District Court erred in denying the appellant's motion for a new trial.

III.

The District Court erred in imposing sentence upon the appellant.

ARGUMENT

No question can be raised as to the legal efficacy of the two rules of law cited by the appellant in the argument and on which his sole basis of reversal rests. The question raised by these rules is whether or not the actual facts in this case would warrant the application of the rules in the direction which he indicates. The first rule, that relating to agency, might be paraphrased as follows:

He (the Government) who sets another person to do an action in his stead, to-wit (Daggett) as agent, is chargeable by such acts as are done under that authority, so, too, properly enough, is affected by admissions made by the agent (Daggett) in the course of exercising that authority.

No evidence was introduced by the Government from any other witness than Daggett, and therefore, admissions made by any other persons than Daggett are not admissible as against the case of the Government. Yet the appellant seeks to bind the Government by statements made by Prohibition Agent-in-Charge Earl Corwin, who was present at the time of the arrest. Yet the facts and circum-

stances of the arrest were not introduced by the Government and form no part of the case in chief.

There is no such official, semi-official, or implied official connection between the Government and Agent Corwin which would make his statements binding as against the Government, or in any way controlling or affecting the testimony of Daggett in such a manner as to make his statements admissible as controverting the good faith, the fairness, or the position of Daggett, or the Government's case as a whole.

By the same implication the second argument, to-wit, that these remarks formed a part of the res jestae of the arrest must follow. The government introduced no testimony relative to the arrest whatsoever. The arrest, as the affidavit of the appellant himself will show, was part of the general clean-up prior to Thanksgiving in this District, and these remarks were made some little time after the direct physical arrest of the defendant and appellant. While the circumstances of the remarks may have been proper, they did not occur at such a time immediately at or during the arrest of the appellant as to form an actual part of the physical arrest and were so incidental to the testimony in chief as not to be even

introduced by the Government as a necessary part of the case, nor a part of the res gestae by appellant's own rule.

What the appellant is really seeking to do in this case is to impugn the good faith of the Government and show a scheme to "railroad" or unfairly prosecute this appellant by evidence which is clearly inadmissible and along which line there are no corroborating facts or circumstances other than a chance remark, according to appellant's claim, the truth or falsity of which has not been established. It was properly stricken as having no proper place in the testimony which should go to the jury, and no error was committed in denying this offer.

Respectfully submitted,

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